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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No._____

TRAVELERS INSURANCE COMPANY,
Petitioner,

vs.

MILDRED T. WILKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of Travelers Insurance Company, a corporation, the Petitioner herein, respectfully shows unto this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

On May 9, 1939, the Petitioner issued two life insurance policies, each in the sum of Five Thousand Dollars, upon the life of Randolph C. Wilkins (115).

Within the contestable period the Petitioner brought suit in the United States District Court for the Southern District of Florida seeking cancellation of the two policies.

In that suit the original defendant was Mildred T. Wilkins, (the Respondent herein) widow of Randolph C. Wilkins, in her individual capacity of beneficiary and as administratrix of her husband's estate.

Subsequent to the trial but before Appeal to the United States Circuit Court of Appeals for the Fifth Circuit, Mrs. Wilkins was married to E. Jackson Butler, who joined in the Appeal and is now a party to the cause, including these proceedings (2).

The Petitioner as original plaintiff, based its suit for cancellation of the policies upon the ground that Mr. Wilkins failed to fulfill his obligation to disclose to the Petitioner material facts relating to his health, and thus permitted the Petitioner to issue the policies and receive the first premium in ignorance of such material facts.

All material matters are either admitted by the pleadings, or established by uncontradicted evidence, and there is no dispute as to what the facts are.

The difference between the parties rests upon a question of law because the respondents contend that if, in making the application for the policies, Mr. Wilkins acted in good faith, and if the material statements in the application relating to his health and consultation with physicians were true on the date when he made them and signed the application, then the life insurance

policies issued upon the faith of the application and in reliance upon the truth of the statements contained in it are valid and subsisting contracts, notwithstanding the fact that after the date when the application was signed but before the insurance company had acted upon it and issued the policies, and six weeks before the first premium was paid, Mr. Wilkins knew that the material statements relating to his health and consultation with physicians were no longer true, and notwithstanding the fact that Mr. Wilkins omitted to disclose to the insurance company the information that had come to him, although during the period mentioned he was several times in consultation with the medical examiner of the company in connection with other phases of his physical examination for insurance and although the insurance company in issuing the policies and in accepting payment of the first premium was wholly ignorant of the developments of which Mr. Wilkins had knowledge.

In short, the respondents contend that in an application for life insurance, material statements relating to the health of the applicant and his consultations with physicians are not continuing representations, and all that the law requires is that the statements be true when made. That if, before the application is acted upon, the material statements become untrue and the applicant knows that they are no longer true, he may nevertheless remain silent and permit the insurance company to change its position and issue policies upon the faith of the application, in ignor-

ance of the falsity of statements contained therein, of which falsity the applicant has knowledge, and thus gain the benefit of a contract that the insurance company would not have entered into if the applicant had disclosed the information that he possessed.

The application for the insurance was given to the agent on March 14, 1939, and Part 1 of the application was signed by Mr. Wilkins on that date (27 and 117).

There was some delay in Mr. Wilkins presenting himself for examination by the medical examiner for the insurance company (28) but on April 12, 1939, he called at the office of the medical examiner, Dr. R. D. May, and was examined by him (49).

Dr. May asked Mr. Wilkins the several questions appearing on Part 2 of the application, filled in the blank lines with the information so procured and then Mr. Wilkins, on that date, April 12, 1939, signed his name at the bottom after the form had been filled out (49 and 117).

When Dr. May's report of his examination of Mr. Wilkins was received at the home office of the company in Hartford, the assistant medical director, on April 20, 1939, wrote for a further complete chemical urinalysis, on another authenthic specimen of normal specific gravity, and for further information on the subject of reduction in weight (Exhibit D, 129).

On the same day, April 20, 1939, the company wrote by air mail to Dr. Edwin C. Swift, who had been named by Mr. Wilkins as his last medical consultant in the year 1936 (117) (Exhibit F, 131), and Dr. Swift answered promptly on April 21, 1939, giving the information requested (Exhibit G, 132).

On May 6, 1939, Dr. May advised the company that he had seen Mr. Wilkins on that day and also on the day before, had procured additional specimens of urine, had made a further investigation concerning loss of weight, and had secured Mr. Wilkins' promise to come in again the following week and give a further specimen of urine (Exhibit E, 130).

On May 18, 1939, the medical director again wrote to Dr. May asking for further information about the urinalysis (Exhibit H, 133) and on May 23, 1939, Dr. May rendered his final report (Exhibit I, 134).

The two policies were prepared bearing date May 9, 1939 (39-40 and 115), and were sent to the Jacksonville, Florida, office subject to final release upon further medical information that had been requested (40) and by telegram dated May 24, 1939 (40), were released to Stanley Bellamy, the soliciting agent, on May 25, 1939 (39).

The policies were delivered to Mr. Wilkins about the end of May or the early part of June, 1939 (33-4-5).

The first premium was paid on June 12th or 13th or 14th, 1939 (30-31 and 38).

The application upon which the policies of insurance were issued contained the following language over Mr. Wilkins' signature.

> "17. I hereby agree for myself and for any person who may have or claim an interest in any contract which may be issued upon this application, as follows:
>
> * * * * *
>
> B. That every statement herein above contained is true; and that the contract issued hereupon shall not take effect unless the first premium shall be actually paid while I am in good health in so far as I have knowledge or information" (117).

The statements contained in the application included the following:

> "13a. Have you ever had * * * fainting spells, vertigo or dizziness * * * Answer, No * * * Disease of heart? Answer, No. * *.
>
> 15A. What physician did you last consult?
>
> Answer, Dr. Swift, Jacksonville, Fla.
>
> B. When? Answer, 1936.
>
> C. For what? Answer, Fever.
>
> D. Duration of illness? Answer, 3 or 4 days.

E. Present health? Answer, good" (117).

At the bottom of the page, under the foregoing questions and answers, Mr. Wilkins signed the following agreement:

> "I hereby agree that every statement hereinabove contained is true and that they shall constitute a part of my application.
>
> (Signed) Randolph C. Wilkins" (117)

Just two weeks after making the foregoing statements to Dr. May on April 12, 1939, and prior to any of the three succeeding visits to Dr. May's office for the completion of the examination as to urine and weight, Mr. Wilkins experienced symptoms described by him as a lump in his chest and dizziness. This was on April 26 and 27 (5 and 54).

On April 28th Mr. Wilkins consulted Dr. E. C. Swift and described the symptoms mentioned and stated that on the preceding day while walking in the street he became so dizzy and fainty that he had difficulty in walking half a block to the car; sat in his car for ten or fifteen minutes and the attack passed off and since that time he had had a lump come and go in his chest (54).

On the same day—April 28—Dr. Swift caused an electrocardiogram of Mr. Wilkins' heart muscle to be made (5 and 55) and on the follow-

ing day, April 29th, having diagnosed the disease as myocarditis, a heart muscle condition, the doctor so informed Mr. Wilkins (5, 11, 75 and 86) and advised him to lighten up on his work and cut down on smoking (5, 58, 76, 86 and 87.)

Mr. Wilkins continued under Dr. Swift's care until the end of May, 1939, and was seen by the doctor professionally on May 9th, 23rd and 31st.

Mrs. Wilkins, one of the respondents, called on Dr. Swift and inquired about her husband's condition and was informed by the doctor that Mr. Wilkins certainly would not be able to get life insurance for the next year or maybe two, as a person with such a history would habitually be rejected by life insurance companies for approximately two years as an unacceptable risk (75, 76 and 78).

After experiencing the symptoms described, and after being informed by Dr. Swift of his heart condition, Mr. Wilkins reported to Dr. May three more times for the completion of his examination, on May 5th, 6th and 18th, 1939 (6, 49 and 50), but at no time did Mr. Wilkins disclose to Dr. May or to any other agent or representative of the insurance company the existence of the symptoms, or his several visits to Dr. Swift, or the making of the electrocardiogram, or the information concerning his heart condition, or the advice given to him by his doctor and the company was ignorant of the circumstances recited (6, 31, 32, 39, 41, 43, 44, 46, 47 and 50).

If the insurance company had possessed the information possessed by Mr. Wilkins, the policies would not have been delivered and payment of the premium would not have been accepted (41, 44 and 47).

On October 30, 1939, Mr. Wilkins died of coronary thrombosis due to myocarditis, chronic, of six months duration (6 and 125), the death certificate having been signed by Dr. E. C. Swift (126).

The United States Circuit Court of Appeals for the Fifth Circuit by a divided Court, on February 18, 1941 reversed the judgment of the United States District Court (137-143).

The dissenting member of the Court adopted the opinion of the United States District Court, reported in 33 F. Supp. 117 (142).

Petition for Rehearing was filed (144) and denied on March 20, 1941 (150).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, c 229 Section 1, 43 Stat. 938, U.S.C.A. Title 28, Sec. 347(a). The requisite diversity of citizenship and amount in controversy appear from the pleadings in the District Court (2 and 4).

QUESTIONS PRESENTED

The questions presented by this petition rest upon the ruling of the Circuit Court of Appeals as stated in the majority opinion (137) reversing the judgment of the District Court (100-112).

The dissenting opinion (142) adopts the opinion of the District Court (100), which opinion is reported in 33 F. Supp. 117.

The questions relate to Florida contracts and may be stated as follows:

1. Is it the duty of the Federal Courts in construing Florida contracts of insurance, to follow the decisions of the Supreme Court of Florida, which is the Court of last resort?

The Circuit Court of Appeals declined to follow the decisions of the Supreme Court of Florida and declined to apply the doctrine recognized by that Court and announced in its opinions.

2. Thirteen days before the date of the judgment now complained of, the United States Circuit Court of Appeals for the Fifth Circuit filed an opinion recognizing the rule of law under the Florida decisions to be that if an applicant for life insurance knowingly makes a false statement of fact (not a mere statement of opinion), such as a negative answer to a question as to whether the applicant had consulted a physician within the past five years, such false answer is material as a matter of law and prevents recovery on the

policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive.

In such circumstances, was it the duty of the United States Circuit Court of Appeals to follow and apply in this case, the same recognized Florida doctrine which remained unchanged?

The Circuit Court of Appeals declined to follow and apply the Florida rule of law.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Because in answering the questions stated next above, the majority opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of the Court of last resort in Florida, this is to say, the Supreme Court of Florida in the case of *New York Life Insurance Company vs. Kincaid,* 122 Fla. 283, 165 So. 553, *Thompson vs. New York Life Insurance Company,* 143 Fla. 534, 197 So. 111, and *Winer vs. New York Life Insurance Company,* 143 Fla. 652, 197 So. 487.

2. Because in answering the questions stated next above, the majority opinion of the Circuit Court of Appeals is in conflict with the rule of law in Florida, the existence of which rule was recognized by this Court in *Mutual Life Insurance Company vs. Hilton-Green,* 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202, and which rule of law had been recognized by the United States Circuit

Court of Appeals for the Fifth Circuit thirteen days before the date of the judgment now assailed in the case of *Metropolitan Life Insurance Company vs. Madden,* 117 F (2) 446.

3. Because in answering the questions stated next above, the majority opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court, that is to say, the case of *Stipcich vs. Metropolitan Life Insurance Company,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895, and *Piedmont and Arlington Life Insurance Company vs. Ewing,* 92 U. S. 377, 23 L. Ed. 610, the doctrine of which cases constitute the law of Florida as announced by the Supreme Court of Florida in *Massachusetts Bonding & Insurance Company vs. Hoxie,* 129 Fla. 332, 176 So. 480.

Petitioner presents herewith a certified transcript of the record in the case in the Courts below, including the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, and also presents a supporting brief of Petitioner's counsel which is annexed to this petition.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of

the record and all proceedings in the case numbered and entitled on its docket, "Number 9640. Mildred T. Wilkins, Appellant, versus Travelers Insurance Company, Appellee"; and that said judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just.

THE TRAVELERS INSURANCE COMPANY,
a corporation.

By Francis M. Holt,
Counsel for Petitioner.

VERIFICATION

COUNTY OF DUVAL }
STATE OF FLORIDA } ss.

Before me this day personally appeared FRANCIS M. HOLT, who having been first duly sworn did depose and say that he is counsel for Travelers Insurance Company, the Petitioner herein; that the matters and things alleged in the above and foregoing Petition for Writ of Certiorari are true and that in his opinion the said Petition is well founded in point of law.

FRANCIS M HOLT
FRANCIS M. HOLT.

Subscribed and sworn to before me

this 12 day of April, A. D. 1941.

MURIEL SCARBOROUGH
Notary Public.

SEAL

BRIEF IN SUPPORT OF PETITION

The final judgment and decree of the U. S. District Court (109) and the opinion of the U. S. District Court (100) contained certain findings of fact as will appear by reference to the record.

The opinion of the U. S. District Court is reported in 33 F. Supp. 117.

The opinion of the Circuit Court of Appeals was filed February 18, 1941 (137) and on the same date judgment was entered accordingly (142).

Petition for Rehearing was filed March 7, 1941 (144) and was denied March 20, 1941 (150). The opinion by the Circuit Court of Appeals has been reported in 117 Fed. (2) 646, and the various opinions and orders appear in the record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938, U.S.C.A. Title 28, Section 347 (a).

The propriety of an order by this Court granting the foregoing petition for writ of certiorari will find support in the following cases:

Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, in which judgment of the Circuit Court of Appeals for the Second Circuit was reversed.

Ruhlin vs. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, reversing judgment of the Circuit Court of Appeals for the Third Circuit.

Stringfellow vs. Atlantic Coast Line Railroad Company and *Atlantic Coast Line Railroad Com-*

pany vs. Stringwfellow, 290 U. S. 322, 78 L. Ed. 339, reversing judgment of Circuit Court of Appeals (Fifth Circuit) in 64 F (2) 173.

Ormsby, et al vs. Chase, 290 U. S. 387, 78 L. Ed. 378, reversing judgment of Circuit Court of Appeals (Third Circuit) which awarded new trial, 65 F (2) 521.

Travelers Protective Association of America vs. Prinsen, 291 U. S. 576, 78 L. Ed. 999, which affirmed judgment of District Court and reversed judgment of Circuit Court of Appeals (Tenth Circuit) awarding new trial, 65 F. (2) 841.

Eastman Kodak Company, et al vs. Gray, 292 U. S. 332, 78 L. Ed. 1291, affirming judgment of District Court and reversing judgment of Circuit Court of appeals (Third Circuit) 67 F. (2) 190.

ARGUMENT

The Circuit Court of Appeals in the majority opinion, concedes and recognizes the existence of the doctrine of continuing representations, as laid down by this Court in *Piedmont & Arlington Life Insurance Company vs. Ewing,* 92 U. S. 377, 23 L. Ed. 610, and *Stipcich vs. Metropolitan Life Insurance Company,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895, and approved by the Supreme Court of Florida in *Massachusetts Bonding & Insurance Company vs. Hoxie,* 129 Fla. 332, 176 So. 480. See the majority opinion of the Circuit Court of Appeals as it appears in the record (137-142).

Therefore, it must be assumed that if material statements as to matters of fact contained in the application were true on the date when Mr. Wilkins made those statements, if later, and before the insurance company acting upon the truth of the statements, issued the policies, the material statements as to matters of fact became untrue, their falsity would avoid liability under the insurance contract if the applicant failed to disclose the facts then within his knowledge and permitted the insurance company to change its position upon the faith of the application.

It therefore follows that at the time when the insurance contract was consummated, Mr. Wilkins stood in the position of representing to the insurance company that:

(a) He had never had fainting spells, vertigo or dizziness.

(b) He had never had disease of the heart.

(c) He had not consulted a physician since 1936 (more than three years before).

(d) His health was then good.

Admittedly, the insurance company had no knowledge of the falsity of the several statements.

Thus the case is reduced to simple form and may be stated as follows:

Point 1. Were the statements in the application to the effect that Mr. Wilkins had never had fainting spells, vertigo or dizziness or disease of the heart and that he had not consulted a physician since 1936, true or false?

Point 2. Were the statements known by Mr. Wilkins to be false?

Point 3. Did the statements constitute matters of fact rather than mere opinion?

Point 4. Under the law of Florida were the statements material?

Point 5. Under the law of Florida does false representation of material facts avoid liability under an insurance policy without conscious, fraudulent purpose to deceive?

POINT 1

Unquestionably the statements referred to were false at the time when the contract was consummated.

Moreover, the Trial Court found as a matter of fact that the statements were false (105 and 108).

The law of Florida is that findings of fact by the Chancellor will not be disturbed on appeal unless clearly erroneous.

That such rule is the law of Florida, see *Markell vs. Hilpert,* 140 Fla. 842, 192 So. 392.

That the Circuit Court of Appeals for the Fifth Circuit recognizes the existence of this rule as the law of Florida, see *Stevens vs. Edwards* (5 CCA) 112 F. (2) 534, wherein the rule is stated upon the authority of *Markell vs. Hilpert,* supra.

As has already been pointed out, there is no doubt but what the statements were false and the Circuit Court of Appeals did not question the findings of fact by the District Court.

POINT 2

It will not be contended that the falsity of the statements was unknown to Mr. Wilkins.

The District Court expressly so found (105 and 108).

Under the law of Florida these findings of fact by the District Court were binding upon the Appellate Court unless the findings were clearly erroneous and no such contention is made.

In addition to the authorities cited in Point 1, we could cite a vast number of decisions by the Supreme Court of Florida, but to do so would uselessly increase the volume of this brief.

We will content ourselves with a reference to a few recent decisions.

Citizens State Bank vs. Adams, 140 Fla. 578, 193 So. 281.

Smith vs. Stillman, 141 Fla. 312, 193 So. 63.

Tampa Theatre Building vs. City of Tampa, 141 Fla. 299, 193 So. 61.

Bond vs. Key, 141 Fla. 160, 192 So. 599.

POINT 3

Conceding that the question as to whether a person is in good health may call for an opinion, the fact remains that Mr. Wilkins knew that he had had a dizzy spell and a lump in his chest (5 and 54). He knew that he had consulted Dr. Swift, not once but five different times and had an electrocardiogram of his heart muscle made (5, 11, 55, 58, 75, 76, 86 and 87).

That such knowledge constitutes knowledge of matters of fact rather than matters of mere opinion, see *New York Life Insurance Company vs. McCarthy,* (5 CCA), 22 F (2) 241, Headnote 3 and text on page 244, *Mutual Life Insurance Company of N. Y. vs. Hurni Packing Company,* (8 CCA), 260 Fed. 641, Headnote 1 and supporting text.

The following is a quotation from an opinion rendered by the Fifth Circuit Court of Appeals in the case of *Aetna Life Insurance Company vs. Bolding,* (5 CCA), 57 F (2) 626:

"At the time of making his application for insurance Bolding was in the care of a physician, and only a few days before he had submitted to an X-ray examination. Although it might have been a matter of opinion with him as to whether he was suffering from any ailment or disease, he knew that he was then consulting physicians for some one or more of the diseases mentioned in the list of questions he was required to answer. Those questions were not limited generally to diseases of the stomach or intestines, but they referred specifically to 'any other disease or illness'; and consequently called for information from him as to any consultation with his physicians concerning a disease of the gall bladder, regardless of whether in his opinion he was suffering from such an ailment or disease."

POINT 4

There is no doubt but what the false statements were material.

The Petitioner's witness, Laurence P. Allison, after testifying that he had no knowledge of the symptoms experienced by Mr. Wilkins and his consultations with and treatment by Dr. Swift, testified further that if he had had knowledge or information of the existence of the things mentioned he would not have approved the issuance or the release of the policies without further investigation and consultation with the medical department of the company (41).

The witness further testified that he was familiar with the customs and usages of life insurance companies generally, and that under such custom insurance companies generally, having knowledge of the impairments mentioned, would not have accepted the application without further investigation and further consultation with their medical departments (42).

Mr. Allison was the assistant secretary of the insurance company in whose department and under whose supervision the application in the instant case was handled.

To the same effect is the testimony of Raymond W. Southergill, assistant underwriter of the company, who personally handled the transaction (44, 45).

Dr. William W. Dinsmore, assistant medical director of the company, testified to the same effect (47).

This having been established without contradiction in the record, it is clear that the misrepresentations were as a matter of law, material, and under the terms of the contract invalidated the policies.

Under the law of Florida factual representations such as those under discussion are material as a matter of law. See *Thompson vs. New York Life Insurance Company,* 143 Fla. 534, 197 So. 111, from which we quote:

> "The chief medical director who approved the insured's application testified in effect that had he known her real medical history, he would have rejected her application and he also testified that reputable insurance companies generally would have done so."

The opinion by the Florida Court closes with the following statement:

> "An insurance company is not bound to accept any risk that is offered. It may exercise its discretion and its judgment as to whether or not it will issue a policy of insurance upon the life of any particular individual. Before it reaches a conclusion it is entitled to have such information as it may desire in regard to the health, habits and physical condition of the applicant. It is the duty of an applicant for insurance to answer truthfully the questions which he assumes to answer and which are to become a part of his application and of the insurance contract. Whether or not these questions and answers disclose facts material to the risk are matters for the insurer to determine and it can only reach a fair determination when furnished with truthful answers."

In the later case of *Winer vs. New York Life Insurance Company,* 143 Fla. 652, 197 So. 487, the Supreme Court of Florida said:

> "In the instant case the insured concealed the fact that he had consulted a physician, and as a consequence the insurer made no investigation. If the insured

had truthfully answered the questions, the insurer would thereby have been supplied the data and means of discovering the true condition of the insured's health."

* * * *

"A positive statement of fact, falsely made with respect to a material matter, will, nothing else appearing, be deemed to have been made willfully and with intent to deceive. It is only when the consultation and treatment relates to such temporary disorders or ailments as do not conflict with the definition of good or sound health as given above that negative answers to questions of this character can be disregarded as immaterial. See *Mutual Life Ins. Co. of New York v. Hurni Packing Co.,* (8 Cir.) 260 Fed. 641, 171 C. C. A. 405; *Mutual Life Ins. Co. v. Hilton-Green,* 241 U. S. 613, 622, 36 S. Ct. 676, 60 L. Ed. 1202; *Plumb v. Penn Mutual Life Ins. Co.,* 108 Mich. 94, 65 N. W. 611. If the answer is untrue, and the matter is material, and the maker of the statement necessarily knows that it was not true when he made it, the intention to deceive the insurer is necessarily implied as a consequence of such act. See *Mutual Life Ins. Co. v. Hurni Packing Co., supra,* 260 Fed. 646, 171 C. C. A. 405; *Claflin v. Commonwealth Ins. Co.,* 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76."

In closing the opinion the Supreme Court of Florida said:

"Had the insured truthfully answered the questions the insurer would thereby

have been supplied with data and means of discovering the condition of insured's health. This unmistakably was his duty in the exercise of good faith in his application for reinstatement of the policy."

POINT 5

The Circuit Court of Appeals for the Fifth Circuit has expressly recognized that the law of Florida is as we have stated it to the effect that representations in an application for life insurance wherein the applicant falsely stated that he had not within the past five years consulted or been treated by physicians were material as a matter of law.

The case to which we refer is *Metropolitan Life Insurance Company vs. Madden,* 117 F. (2) 446, from which the following quotation is taken. In making the statement quoted below the Circuit Court of Appeals cited as authority the Florida cases of *Thompson vs. New York Life Insurance Company* and *Winer vs. New York Life Insurance Company, supra.*

> "The answer sought to be elicited by the question was an answer of fact and not of opinion. If it was not material, its falsity was wholly unimportant, but if, as here, it was material as matter of law, and, as here, the answer was, and was known to be, untrue, its giving prevented recovery on the policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive."

Inasmuch as the representations in the application were representations of fact and not matters of mere opinion; and inasmuch as the representations were material to the risk; and inasmuch as the representations were false; and inasmuch as the representations were known by the applicant to be false at the time when the contract was consummated, it follows that such false representation of material facts will invalidate these insurance policies without proof of actual, conscious design to defraud.

The rule of law embraced in the foregoing statement has been expressly recognized and approved by the Supreme Court of Florida in the case of *New York Life Insurance Company vs. Kincaid,* 122 Fla. 283, 165 So. 553, text page 559, from which we quote:

> "It is also academic that failure by the one insured to disclose conditions material to the risk of which he is aware make the contract voidable at the insurer's option. This principle is well settled and is approved by this court."

The stated rule is the law of Florida today and the Kincaid case, as to this particular point, has been cited by the Supreme Court of Florida as late as August 2, 1940, in the case of *Winer vs. New York Life Insurance Company, supra.*

That such rule of law as applied to Florida life insurance contracts is approved by this Court, see *Mutual Life Insurance Company vs. Hilton-*

Green, 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202, from which we quote the first headnote:

> "1. Material incorrect representations in the application for a policy of life insurance, which is made an essential constituent of the policy, if known to be untrue by the assured when made, invalidate the policy without further proof of actual, conscious design to defraud."

CONCLUSION

For the reasons stated in this petition and in this brief, it is respectfully submitted that the petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1940
No. 949

TRAVELERS INSURANCE COMPANY
Petitioner,

versus

MILDRED T. WILKINS,
Respondent.

REPLY BRIEF OF RESPONDENT, MILDRED T. WILKINS, TO THE PETITION FOR WRIT OF CERTIORARI

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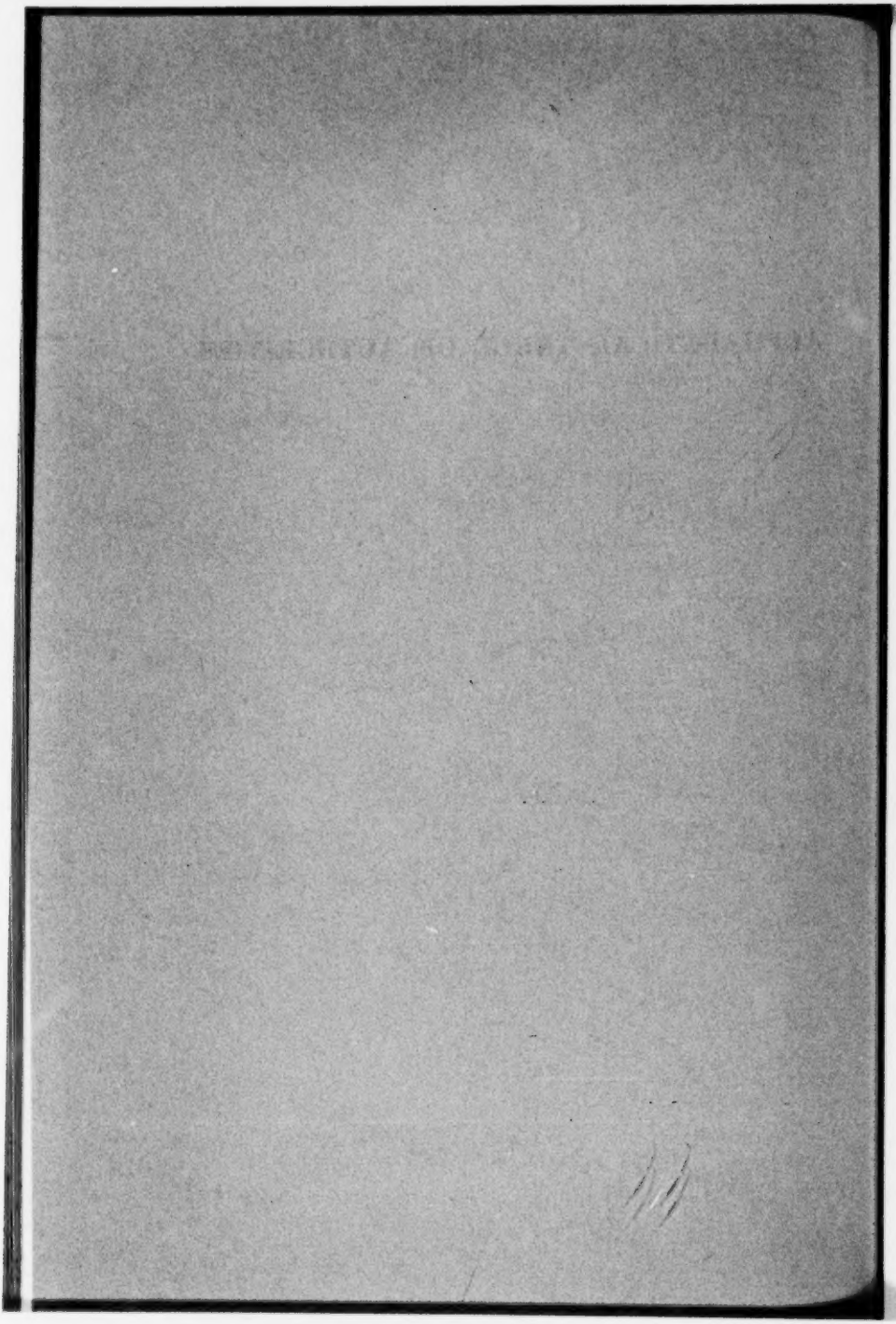

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This case does not present any question for review on writ of certiorari.

There is no federal question involved.

The Circuit Court of Appeals has not rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

The Circuit Court of Appeals has not decided an important question of local law in conflict with applicable Florida decisions.

Quite to the contrary.

The contract here in question was a Florida contract governed by Florida law, and there are applicable Florida decisions which were properly followed by the Circuit Court of Appeals.

The present case involves a suit brought by the insurance company to cancel two policies of insurance on the life of the deceased. The theory upon which the insurance company based its claim for cancellation was that because the insured visited his personal physician subsequent to the signing of the application for the policies, but prior to the delivery thereof and the payment of the first premium, the insured was guilty of fraud in not advising the insurance company of these visits.

In Florida the test of whether a false representation has been made so as to permit the insurance company to cancel the policy is *whether the insured acted in good faith.* This is true even when the erroneous statement is an affirmative answer to a direct question. It is, of course, much more essential to show bad faith when the alleged misrepresentation, as in this case, consists of an unanswered question which was not propounded to the insured at all, but which the insurance company is seeking to carry forward into the future by indirection and legal presumption.

It is admitted that the insured gave absolutely true answers to each and every question propounded to him in the application. The insured did visit his doctor after the date of the signing of the application and before the date of the delivery of the policies, but was told by his doctor that his illness was of a purely transitory nature due entirely to excessive smoking and overwork. The insured did not miss one moment of time from work. He was not put on any diet or given any medicine (other than a tonic), and he was not even advised to follow any specified medical regime. He was not told or led to believe that he was an ill man in any sense of the word, and he was discharged as a well man prior to the date of the delivery of the policies. To use the doctor's own words in answer to a question on this particular subject:

> "Q. Was there anything that you can remember that you said to Mr. Wilkins, or that you conveyed to Mr. Wilkins that would in your opinion convey to his mind that he was not a well man when you discharged him?
>
> A. No, not in the least." (Record 60-61).

Not a single witness was introduced, nor was any evidence of any kind introduced to prove, or attempt to prove, that the insured did not think himself a well man prior to the date of the delivery of the policies and the payment of the first premium. Nor was there anything in the record to indicate that the insured did not act in com-

plete good faith in his dealings with the insurance company. Quite to the contrary, all of the testimony of all of the witnesses indicated that the insured did act in good faith and actually did believe himself to be a strong, well, vigorous individual up to the date of his death.

On these facts the case, as properly held by the Circuit Court of Appeals, is controlled by applicable Florida decisions.

In the case of *New York Life Insurance Company v. Kincaid* (Fla.) 165 So. 553, false answers were given by the applicant to direct questions, yet the Florida Court held, in line with the generally recognized rule, that such false answers did not operate to avoid the policy because the insured was not shown to have knowledge of their falsity and was, therefore, *not shown to have been acting in bad faith.*

In the Kincaid Case, the insured, in applying for reinstatement of a policy, certified to the company in writing that:

1. To the best of his knowledge and belief he was in the same condition and health as when the policy was issued.

2. Within the last two years he had had no illness, disease or bodily injuries, nor had he consulted or been treated by a physician except by Dr. W. Osenback on July 24, 1929, for hemorrhoids.

The truth of the situation was, as the Insurance Company found out later:

1. The Insured had been treated by Dr. Osenback, not only on July 24, 1929, but in August, 1927, April, May, 1928, and in June and July of 1929.

2. He had had abcesses on the chest and neck.

3. Dr. Osenback had removed a cyst and wart from his face.

Having discovered these facts the Company brought suit to cancel the policies. Holding that there was no evidence of a knowing or deliberate and intentional misrepresentation and that therefore the Company was not entitled to cancellation, the Court said:

> " * * * It is now contended that Kincaid knowingly made misrepresentations to the Company in that he did not disclose all his visits to Dr. Osenback, and what he was treated for each time during the two-year period covered by the questionnaire and that his policies would not have been reinstated if the undisclosed visits and what they revealed had been known to the Company. The issue of whether or not Kincaid knowingly made misrepresentations to the Company was fully developed by plea, replication, rejoiner, and surrejoinder, which we have examined, but do not deem necessary to enlarge on here.
>
> "Even if he failed to make a full disclosure with reference to his insurability, it does not necessarily vitiate his reinstatement. *The test is whether or not his answers to the questionnaire were made in good faith . . .*" (Italics supplied)

The good faith test established by the Kincaid Case was again recognized by the Florida Supreme Court in the recent case of *Winer v. New York Life Insurance Company* (Fla.) 197 So. 487, decided July 12, 1940, where the Court said:

> "This Court laid down the rule in New York Life Insurance Company v. Kincaid that *the test where Insured failed to make a full disclosure with reference to insurability in application for reinstatement of a lapsed policy of life insurance is whether or not the Insured answered the questions in good faith* and that the question of good faith of the Insured is for the jury to determine. This rule should be applied to the present case but since this is a suit in equity the question of good faith of the Insured is left to the chancellor to determine. *The question of good faith of Insured at the time of answering the question in the application for reinstatement is the sole issue in this case.*" (Italics supplied)

The present case is an *a fortiori* case. Here the insured did not give false answers to direct questions, as was done in both the Kincaid Case and the Winer Case — he gave true answers. He merely failed to tell the insurance company that he had visited his doctor (between the date of the application and the date of the delivery of the policy) to be treated for what he thought was a negligible and minor indisposition from which he promptly recovered. He was definitely and positively so advised by his doctor. Obviously, the test of good faith is all that applied here, and

the Circuit Court of Appeals held that the insured met this good faith test.

The Circuit Court of Appeals was, therefore, merely applying Florida law.

In view of the above Florida decisions, which are controlling, on the facts of this case, and in view of the fact that there is no federal question involved, the petition for certiorari should be denied.

The two cases relied upon by petitioner: *Stipcich v. Metropolitan Life Insurance Company,* 277 U. S. 311, and *Massachusetts Bonding and Insurance Company v. Hoxie* (Fla) 176 So. 480, do not control the issues here, nor are they applicable. The opinion of the Circuit Court of Appeals (Record 141-142) analyzes these two decisions and clearly demonstrates that they are not in point.

That opinion (Record 142) likewise recognizes that the Kincaid Case and the Winer Case do control.

We respectfully submit that the petition for certiorari should be denied.

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